In the

Supreme Court of the United States

October Term, 1977

No. 77-950

COLLECTION CONSULTANTS, INC. AND STELLA THORNTON,

Appellants,

v.

THE STATE OF TEXAS,

Appellee.

On Appeal from the
Court of Criminal Appeals of Texas

JURISDICTIONAL STATEMENT

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The Appellants, Collection Consultants, Inc. and Stella Thornton, respectfully pray that an order issue noting probable jurisdiction to review the Judgment and Opinion of the Court of Criminal Appeals of Texas entered on October 5, 1977.

Opinion Below

The Court of Criminal Appeals of Texas is the court of last resort for criminal appeals in Texas. The Opinion of that court in this case appears in the Appendix at page 3. The opinion is reported at 556 S.W. 2d 787 (Tex. Crim. App. 1977).

Jurisdiction

Jurisdiction of this Court is invoked pursuant to 28 U.S.C., § 1257(2), this being an appeal which draws into question the validity of Tex. Penal Code Ann., § 42.07(a) (2) (1974), on the ground it is repugnant to the Constitution of the United States.

The Appellants were convicted of telephone harassment in the County Criminal Court at Law No. 6 of Harris County, Texas. On appeal, their convictions and sentences were reversed on May 3, 1977. On the State's Motion for Rehearing the convictions and sentences were affirmed on October 5, 1977. On November 7, 1977, the Appellants' Motion for Rehearing was denied without written order. Timely notice of appeal to this Court was filed in the Court of Criminal Appeals of Texas on December 28, 1977. As the Court of Criminal Appeals of Texas explicitly rejected the Appellants' challenge to Tex. Penal Code Ann., § 42.07(a) (2) (1974), this matter is appropriately brought to this Court by appeal. *Coates v. City of Cincinnati*, 402 U.S. 611 (1971).

In the event the Court does not consider appeal the proper method of review, the Appellants request the papers whereupon this appeal is taken be regarded and acted upon as a petition for writ of certiorari pursuant to 28 U.S.C. § 2103. Appellants would show that the state court below has decided the substantial federal question raised here in a way not in accord with applicable decisions of this Court, including *Coates v. City of Cincinnati, supra.*

Constitutional and Statutory Provisions Involved

This case involves the First and Fourteenth Amendments to the Constitution of the United States. This case also

involves Tex. Penal Code Ann. § 42.07(a) (2) (1974), which states:

> §42.07 Harassment.
>
> (a) a person commits an offense if he intentionally:
>
> (2) threatens, by telephone or in writing, to take unlawful action against any person and by this action intentionally, knowingly, or recklessly annoys or alarms the recipient or intends to alarm or annoy the recipient; (4 V.T.C.A. Penal Code, pp. 167-168.)

Question Presented

Whether Tex. Penal Code Ann. § 42.07(a) (2) (1974) which prohibits speech that allegedly annoys or alarms another person violates the First and Fourteenth Amendments to the Constitution of the United States?

Statement

Appellant Collection Consultants, Inc. (hereinafter "Collection") is engaged in the business of debt collection. Appellant Stella Thornton (hereinafter "Thornton") was an employee of Collection. The Appellants were charged by separate informations filed on October 15, 1974, with committing the offense of telephone harassment in violation of Tex. Penal Code Ann. § 42.07(a) (2) (1974). The informations charged that in attempting to collect an alleged debt owed by Ervin O. Grice, the Appellants threatened by telephone to take unlawful action against Mr. Grice. By this action, it was alleged that the Appellants intentionally and knowingly annoyed or alarmed the recipient of the calls or attempted to annoy or alarm the recipient.

The unlawful action allegedly threatened was to continue to call Mr. Grice until the debt was paid. Although

it did not appear on the face of the informations, it was the State's contention at trial that such conduct would violate Tex. Rev. Civ. Stat. Ann. art. 5069-11.03 (Supp. 1974), which states:

> Art. 5069-11.03. Harassment; Abuse.
>
> In connection with the collection of or attempt to collect any debt alleged to be due and owing by a consumer, no debt collector may oppress, harass, or abuse any person by methods which employ the following practices:
>
> ... (d) causing a telephone to ring repeatedly or continuously or making repeated and continuous telephone calls with the willful intent to harass any person at the called number.

The case was tried before a jury from Feoruary 19, 1975 to February 21, 1975. The jury returned a verdict of guilty. Formal sentencing was rendered on March 13, 1975. The court fined Collection $1,000.00 and Thornton $150.00, and sentenced Thornton to 30 days confinement in the county jail, probated for 180 days.

On appeal, the Court of Criminal Appeals of Texas affirmed the convictions. The court summarily held that Tex. Penal Code Ann. § 42.07(a)(2) (1974) does not violate the First and Fourteenth Amendments to the Constitution of the United States.

How the Federal Question Was Raised and Decided Below

Prior to trial, the Appellants moved for dismissal of the informations on the ground that Tex. Penal Code Ann. § 42.07 (a)(2) (1974) is unconstitutional because it is vague and overbroad. The trial court overruled these motions without written order. On appeal to the Court of Criminal

Appeals of Texas, the Appellants' First Point of Error was that the trial court erred in not dismissing the informations because Tex. Penal Code Ann. § 42.07 (a)(2) (1974) is unconstitutional for it violates the First and Fourteenth Amendments to the Constitution of the United States. The convictions were affirmed with the court summarily rejecting the Appellants' constitutional challenge to the statute in question. See Appendix, pp. 9-10.

The Federal Question is Substantial

Telephonic communication is a means of speech and expression protected by the First and Fourteenth Amendments. *Walker v. Dillard*, 523 F. 2d 3 (4th Cir.), *cert. denied*, 423 U.S. 906 (1975); *Huntley v. Public Utilities Commission*, 442 P. 2d 685 (Cal. 1968); *Anniskette v. State*, 489 P. 2d 1012 (Alaska 1971). As construed by the highest criminal court of the State of Texas, Tex. Penal Code Ann. § 42.07(a)(2) (1974) permits the restriction of this type of speech in a vague, overbroad, and standardless manner. Such a restriction contravenes the First and Fourteenth Amendments to the Constitution of the United States.

In holding that the statute in question is not unconstitutional, the Court of Criminal Appeals of Texas ignored this Court's holding in *Coates v. City of Cincinnati*, 402 U.S. 611 (1971). The *Coates* decision held that a city ordinance prohibiting conduct "annoying" to persons was vague and overbroad, and therefore, contravened the constitutional right of freedom of speech.

Precision in the definition of a criminal offense is a right of citizens guaranteed by the Fourteenth Amendment. A statute which either forbids or requires the doing of an act in language so vague that men of common understanding and

intelligence must guess at its meaning and differ on its application violates an essential element of due process of law. *Connally v. General Const. Co.*, 269 U.S. 385 (1926); *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972). In *Grayned v. City of Rockford*, 408 U.S. 104 (1972), this Court stated:

> It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges and juries for resolution on an ad hoc and subjective basis, with the intended dangers of arbitrary and discriminatory application . . . 408 U.S. at 108.

Since the words "annoy" and "alarm" are not defined in the Penal Code of Texas, the statute in question leaves the public uncertain about the conduct that is prohibited. It leaves judges and juries to subjectively decide, without a legally fixed standard, what is prohibited in each case.

The constitutional difficulty with the word "annoying" is that it means different things to different people. Quoting *Connally v. General Const. Co.*, 269 U.S. 385 (1926), this Court said in *Coates, supra*, that:

> [c]onduct that annoys some people does not annoy others. Thus, the ordinance is vague, not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but

> rather in the sense that no standard of conduct is specified at all. As a result, 'men of common intelligence must necessarily guess at its meaning'. 402 U.S. at 614.

The problem identified in *Coates* is exemplified by the situation of the Appellants. Assertive language may be necessary for the successful collection of debts which are long past due. The Appellants could not possibly have known when their conduct became "annoying" or "alarming" and therefore violated the Texas statute. The statute clothes the listener with the sole power of determining if Appellants' speech was beyond the protection of the First Amendment. A similar statute was held unconstitutional by the Supreme Court of Alaska in *Anniskette v. State, supra*, wherein the Court stated:

> That the officer was personally offended by the telephone calls does not render the defendant's conduct a crime. That would be to make the terms of the statute in the content of the First Amendment shift from the mentation and emotional status of the recipient to the verbal communication. Under an objective standard, it is not permissible to make criminality hinge upon the ideological vicissitudes of the listener. A great deal more is required to place speech outside the pale of the First Amendment protection. 489 P. 2d at 1015.

The unconstitutionality of the statute is magnified since it authorizes the listener to determine if the caller commits a crime.

Not only is Tex. Penal Code Ann. §42.07(a)(2) (1974) void for vagueness, but also it violates the related constitutional principle of overbreadth. In *NAACP v. Alabama*, 377 U.S. 288 (1964), this Court stated:

> A governmental purpose to control or prevent activities constitutionally subject to state regulation may not be

> achieved by means which would sweep unnecessarily broadly and thereby invade the area of protected freedoms. 377 U.S. at 307.

Since the statute in question does not provide a readily ascertainable standard of guilt and leaves to conjecture what conduct may subject an actor to criminal prosecution, it is a direct infringement on the constitutional right of freedom of expression. State legislatures may not allow such an infringement by abdicating their responsibility for setting standards of criminal laws. *Smith v. Gougen*, 415 U.S. 566 (1974).

The Court of Criminal Appeals of Texas has not interpreted the statute to limit its workings to constitutionally permitted regulation of speech. This has resulted in a denial of due process to the Appellants. *Hynes v. Mayor of Oradell*, 425 U.S. 610 (1976).

This constitutional challenge to the validity of a statute of the State of Texas is a substantial federal question. Classically, review has been denied where the constitutional claim was a mere reference to a constitutional provision, *Sugarman v. United States*, 249 U.S. 182 (1919); where the contention was obviously without merit or frivolous, *Moyer v. Peabody*, 212 U.S. 78 (1909); or where the Supreme Court has already ruled adversely. *California Water Service Company v. City of Redding*, 304 U.S. 252 (1938). This case presents a real controversy over constitutional rights which depends upon the construction given the statute by this Court. The question, therefore, must be considered a substantial one justifying review by this Court. *Norton v. Whiteside*, 239 U.S. 144 (1915). Where the fundamental rights of free speech and liberty are so clearly involved, as here, the question presented is so substantial as to require consideration of the entire record, with briefs on the merits and oral argument, for its resolution.

Conclusion

Wherefore, for the foregoing reasons, these Appellants pray for an order of this Court noting probable jurisdiction to review the judgment and opinion of the Court of Criminal Appeals of Texas.

Respectfully submitted,

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Proof of Service

I, Robert B. Cousins, IV, attorney for COLLECTION CONSULTANTS, INC. and STELLA THORNTON, Appellants herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 30th day of December, 1977, I served three (3) copies of the foregoing Jurisdictional Statement to the Supreme Court of the United States on all parties in this proceeding required to be served by depositing the same in a United States mailbox, with first class postage pre-paid, at their post office addresses as follows:

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